

**EXHIBIT - 5**

Decision of March 15, 2012 (Transcript Pages 1-59), MDL Docket Document No. 2585 (April 2, 2012), *Estate of John P. O'Neill Sr., et al. v. Kingdom of Saudi Arabia, et al.*, 04-CV-1922 (GBD)(FJM)

Hearing 031512

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----X

4 IN RE TERRORIST ATTACKS ON  
5 SEPTEMBER 11, 2001,

6 03 MD 1570 (GBD)

7 -----X  
8 New York, N.Y.  
9 March 15, 2012  
10 11:15 a.m.

11 Before:

12 HON. GEORGE B. DANIELS

13 District Judge

14 HON. FRANK MAAS

15 Magistrate Judge

16 APPEARANCES

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(In open court; case called)  
THE COURT: Let me do this. Before we go to the motion for relief from the final judgment, let me address the issues that were raised by letter and put those aside and then see if there are other issues that we can quickly resolve and then I'll hear the parties with regard to that motion.  
First of all, Magistrate Judge Maas and I have discussed the issue of entering judgment against Hezbollah based on the other judgments that were entered in this case and based on the inquest that Magistrate Judge Maas has done. We both agree that that is an appropriate thing to do. I'm willing to do that today. And we will enter judgment against Hezbollah in the amounts as were found by Magistrate Judge Maas when he did the inquest on damages.  
The only thing we were both uncertain about and curious about and want to avoid having to do this piecemeal is that why at this point, we're at this issue and whether or not we should be thinking about others. I believe that judgment has not been entered against all the defaulting defendants in that case.  
Are we going to anticipate a further application, or is this sufficient for your purposes at this point?  
MR. CARTER: Your Honor, Sean Carter for the Federal Insurance Plaintiffs.  
If I may provide a little bit of context, it will, I

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think, illuminate why we're here.

There is a presently ongoing a forfeiture action in the Northern District of Illinois through which the Department of Justice is targeting for seizure \$6.6 million in al-Qaeda assets.

At the time the window, statutory window for filing verified claims in the statutory -- in the forfeiture proceeding expired, we did not yet have a final monetary judgment against al-Qaeda.

As a result, the Department of Justice has argued in that forfeiture proceeding that we lack constitutional standing, the 9/11 plaintiffs lack constitutional standing to make claim in the forfeiture proceeding to those funds.

There are presently some separate forfeiture proceedings recently initiated targeting assets associated with Hezbollah in the Southern District of New York. And the reason there's some urgency with regard to the Hezbollah judgment is because we want to avoid the scenario in which we, again, face an argument about standing based on the timing of the judgment.

With regard to the entry of a broader number of judgments, I think that would make sense in order to avoid doing this piecemeal.

In some cases, defendants have objected principally I think because they're concerned about the potential that we would try to use the judgment against a terrorist organization

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to execute against their assets.

It may make sense for us simply to try and enter into a broader stipulation with the defendants that will allow all the terrorist organizations to be treated simultaneously for purposes of a monetary judgment and we can deal with other of the defaulting defendants separately.

THE COURT: Similar to the agreement that you entered into with regard to Hezbollah?

MR. CARTER: Correct, your Honor.

THE COURT: Well just let us know at what point, if you intend to proceed that way, and we'll be prepared to move forward then. But we should have the judgment prepared and ready for you today and filed.

MR. CARTER: Thank you, your Honor.

THE COURT: Now with regard to the -- someone raised an issue -- also you raised an issue with regard to getting a certificate of default from the clerk's office. I'm not quite sure I understood exactly what your communication has been with the clerk's office, if any, on this issue and what if you still have a problem or the nature of that problem.

MR. MIGLIORI: Good morning, your Honor.

Don Migliori from Motley Rice on behalf of the Burnett plaintiffs.

All of other moving parties for this particular default have gotten their certificate. This is purely

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ministerial. It just for some reason didn't come through for

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the Burnett plaintiffs.

THE COURT: Have you had a conversation with the clerk's office?

MR. MIGLIORI: We wrote actually to the court I believe on the 30th of last year -- December 30 end of last year about it. We've had some communication with the clerk's office.

THE COURT: What is their position?

MR. MIGLIORI: Really don't have a clear answer from them. We're just looking for guidance. We didn't know if it was caught up in a different -- in a different process because --

THE COURT: They have not said to you that it is not going to be issued?

MR. MIGLIORI: I believe the response back has simply been that they don't have -- they needed guidance. They weren't going to accept from us in an informal conversation that everything had been done.

We've checked our filings, our pleadings, and everything is there.

THE COURT: What do they say is deficient? That's what I don't understand.

MR. MIGLIORI: We don't understand.

So when we wrote to the court we were simply asking if

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the court could give us some guidance, give us some help in pushing that process along because everything is there and it hasn't issued out.

THE COURT: I mean I could help you but I don't know what the problem is so I'm not sure what -- I haven't been able -- are you dealing with orders and judgments, the clerk?

MR. MIGLIORI: What I propose, your Honor, because -- the motion is much more important. Maybe after this hearing I'll go down personally.

THE COURT: Go to orders and judgments.

MR. MIGLIORI: As long as I can represent that there is no reason from the bench for this to not issue, maybe that will be the kind of assurance.

THE COURT: Not that I'm aware of. That's the thing.

Unless you can articulate for me either who is telling you there's a problem and what the nature of that problem is, I'm not sure if it's just not getting done, they have a position that it cannot be done, they have a position that something is missing, and you haven't assured them that it's not missing. I'm not sure what the issue is.

MR. MIGLIORI: We just know that we've inquired and it's never forthcoming.

So as long as there is no other basis from the bench, I'll go down today and make direct contact. If there's another issue --

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THE COURT: I mean we made some inquiries down there but it's hard for me to communicate with them if I don't know what the problem is.

MR. MIGLIORI: They didn't articulate one to us either. As long as there's no issue from the bench.

THE COURT: Not that I'm aware of. So if there's --

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if you can get -- if you can tell me who you're speaking to and it probably should be somebody in orders and judgments and they can tell you that it's either going to issue or it's not going to issue.

If it's not going to issue immediately, they have to articulate for you what the problem is so you can come back to me and see if we can solve that problem. Or if they say you're missing a document, they can tell you what document it is, if you think you've given it to them and they can't find it --

MR. MIGLIORI: We wouldn't have bothered the court if that were the issue. Let me figure that out and I appreciate it.

THE COURT: Sure. Just contact my chambers or Magistrate Judge Maas' chambers, either one, we'll follow up if necessary. But I'm not quite sure what the problem is that's holding this up.

Are there any other issues that we need to address before I go to the motion? I know you're moving forward with discovery.

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Did I see a hand?

No. All right. Then let me hear you with regard to the motion. Let's address that. I've reviewed the papers and reviewed all of the decisions. So why don't you tell me exactly what your position is.

MR. COZEN: If Your Honor please, Steve Cozen from Cozen O'Connor on behalf of the plaintiffs.

The motion before the court seeks, under Rule 60(b)(6), to vacate judgments entered in this MDL against the Kingdom of Saudi Arabia and the Saudi High Commission, which after dismissal and appeal, became final when the Supreme Court denied certiorari in June of 2009.

However, on November 7, 2011 the Second Circuit in Doe v. Bin Laden and Afghanistan overruled the previous panel's decision in this case, held that 1605(a)(5), the noncommercial tort exclusion to the Foreign Sovereign Immunities Act, is a basis for a suit arising out of the terrorist attacks of 9/11, validated the cause of action against a nondesignated foreign sovereign for providing material support to al-Qaeda, and ordered that the case should proceed.

THE COURT: When you say validated the cause of action, I'm not sure that they made that kind of determination.

MR. COZEN: When I say validated the cause of action, what I meant was they say there is a basis, based upon allegations with respect to the provision of material aid and

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support to sustain jurisdiction under 1605(a)(5) as a tort claim.

THE COURT: Wouldn't it be more accurate to say they said it could be a basis and they sent it back in that case for discovery to determine if, in fact, there was a basis.

MR. COZEN: Well, technically I would not defer or disagree with your Honor in this respect.

They sent it back for two things. One was to determine whether or not the, quote, whether the Taliban-was-the-government defense was an adequate defense. And the second was whether or not discretionary function was



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actually at play.

THE COURT: And that's the critical issue.

MR. COZEN: But the allegations of the complaint and the adoption of the -- the adoption of the district court opinion, together with the articulation of their reasons for their holding, to me validates the cause of action which is -- which was stated in the complaint that Afghanistan, through the Taliban, provided a safe haven for and provided material aid and support to al-Qaeda which enabled them to attack the United States.

THE COURT: well, again, I don't think that that's completely accurate. It validated a possible cause of action. But the court specifically said -- as a matter of fact I'll quote from the opinion: "Let us be clear. We make no judgment

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as to whether the allegations in the complaint are sufficient to state a claim or even to provide jurisdiction."

MR. COZEN: I'm not disagreeing, and perhaps I'm using the word in a general sense, your Honor.

The point is that the Second Circuit, of course, had previously, in August of '08, held in this case that the sole and exclusive basis for upholding the dismissal of our claims against the Kingdom and the Commission was the inapplicability of 1605(a)(5) and the presumed exclusivity of 1605A, the terrorist exception, to the acts complained of in our first amended complaint and in our RICO statements, although they credited our allegations as having been well detailed and well documented, that sole and exclusive basis, your Honor, has now been abrogated. And the law is as stated in Doe.

We are left then, if you will, with an anomalous situation. In the absence of a Rule 60(b)(6) relief in the same MDL, in which similar claims are made, against similarly situated sovereigns arising out of similar wrongful acts resulting from identical harm, that litigation may proceed against Afghanistan but not against Saudi Arabia or the Saudi High Commission.

THE COURT: But that's not -- again, that's not necessarily true.

If, as the Court said -- the Court said, indeed, the district court had ordered further discovery to provide for

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fact-finding with regard to whether the alleged acts were attributable to Afghanistan and whether they were discretionary.

If that discovery determined that those acts aren't attributable to Afghanistan or that discovery establishes that they were discretionary acts, there is no cause of action in Afghanistan -- against Afghanistan.

MR. COZEN: Your Honor, I am not prejudging what final determination this court will make once that jurisdictional discovery is taken with respect to the existence of the cause of action by Afghan -- by the Doe plaintiffs against Afghanistan.

What I am saying is that the sole and exclusive basis for the dismissal of our claims against the Kingdom and the Commission were the applicability of 1605(a)(5), the tort exception on the theory -- never reaching the other issues --

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simply on the theory that the terrorist exclusion or the terrorist exception trumped the tort exception. That has now been disposed of in the Second Circuit.

THE COURT: But, again, I went back and read all of the opinions very carefully. That's not accurate.

What's accurate that you said was that that may have been the sole and exclusive basis on which the Second Circuit affirmed the dismissal. But in reading Judge Casey's opinion, it was not the sole and exclusive basis on which Judge Casey

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determined that there was no cause of action against Saudi Arabia.

MR. COZEN: That is correct, your Honor.

However, if you undoubtedly read again the Second Circuit opinion you'll note footnote fifteen where the court says since we have decided -- on page 49 of their opinion -- since we have decided that 1605(a)(5), the noncommercial tort exception, doesn't apply, it is trumped by 1605A, we don't reach any of the other assertions that -- as to whether or not there is or is not jurisdiction under it.

THE COURT: But I understand -- then I understand your argument. Your argument is that it should -- the judgment should be vacated simply because the Second Circuit didn't reach that issue on appeal as opposed -- you're not arguing that Judge Casey didn't address that issue in his decision.

MR. COZEN: I'm not arguing that Judge Casey didn't address that issue in his decision.

We argued the contrary in front of the Second Circuit.

The Second Circuit never reached that because the Second Circuit made the determination that 1605(a)(5), which Judge Casey said was applicable, they said wasn't applicable. So they never had to reach the subsequent issue of the alternative grounds for dismissal.

THE COURT: Okay. So that --

MR. COZEN: So now what we are left with, your Honor,  
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if you please, is that we have a rather perverse situation in which the plaintiffs in Afghanistan are entitled to proceed with their case.

I don't want to conflate -- and I would like this Court not to conflate -- the issue of whether or not we are entitled to 16 -- to Rule 60(b)(6) relief with the issue of whether or not the defendants, the Kingdom and the Commission, have a right to assert, once those judgments are open and they're back in the case, whether they have a right to assert that they have some legal basis for getting out of the case.

THE COURT: But that was all argued and litigated before Judge Casey. Why do you --

MR. COZEN: But it was never determined on appeal.

THE COURT: But that's appeal.

I'm trying to figure out -- you're saying that even if it's decided by this court that because it wasn't addressed on appeal that you get a do-over?

MR. COZEN: Yes.

In fact, not only do we get a do-over. I'm saying I never had the right to have the Second Circuit determine whether or not my arguments as to why Judge Casey was wrong



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22 when he said I'm going to let them out on discretionary  
23 function, when the body of law that was developing was clear  
24 that discretionary function didn't apply when you violated  
25 international law and acts -- and laws of humanity. I never

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1 got an opportunity to have that issue determined by the Court  
2 of Appeals.

3 THE COURT: Okay.

4 MR. COZEN: Because they first decided that the  
5 tort -- the noncommercial tort exception simply didn't apply.  
6 Judge Casey, in fact, had said it did apply. So we're  
7 not here -- we're not here, your Honor, because of what Judge  
8 Casey held or what Judge Casey didn't hold.

9 We are here because in Doe v. Afghanistan they  
10 reversed the opinion in our case.

11 THE COURT: Right.

12 MR. COZEN: And said you are entitled to go further  
13 and have your claims determined and heard.

14 THE COURT: No. They said you were entitled to a  
15 similar consideration that you received by Judge Casey. Isn't  
16 that really what they said?

17 MR. COZEN: No. Because then your Honor if that's the  
18 case, then are you telling me that I have a right now to file a  
19 new appeal from Judge Casey's original decision and ask the  
20 Court of Appeals to rehear the case years later?

21 That's not the procedure.

22 THE COURT: No. You would have the right, if I were  
23 to deny your motion, to appeal that denial of your motion on  
24 the basis in which you're arguing that the Second Circuit  
25 didn't have the opportunity to decide this issue and should now

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1 decide this issue in the context of the ruling that's already  
2 been made in this case.

3 MR. COZEN: Well I understand, your Honor. But I  
4 don't think that's how it works.

5 THE COURT: You want a do-over though.

6 MR. COZEN: No --

7 THE COURT: Judge Casey has already ruled.

8 Are you asking for a different ruling from me than  
9 Judge Casey already gave you on this issue?

10 MR. COZEN: Well, if Your Honor please, what I'm  
11 asking first is that you rule on a 60(b)(6) motion.

12 THE COURT: To vacate and to do what?

13 MR. COZEN: To vacate the judgment.

14 THE COURT: And do what?

15 MR. COZEN: To allow the defendants back in the case,  
16 let them assert the same legal defenses. Let us argue them.

17 THE COURT: But you already did that.

18 MR. COZEN: No, but, your Honor --

19 THE COURT: You did that before Judge Casey and Judge  
20 Casey said the record is undisputed that these are  
21 discretionary acts. Isn't that what he ruled?

22 MR. COZEN: Excuse me, your Honor. No.

23 The fact of the matter is there was no -- there was no  
24 evidentiary record in that regard. Judge Casey made the  
25 determination that this was -- that this was subject to the

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discretionary function defense because of what he perceived the law to be.

And what I'm suggesting, that's not the law of this case at this juncture.

THE COURT: But Judge Casey's determination was after you had a full opportunity to make the argument.

MR. COZEN: Absolutely.

THE COURT: And you made the argument.

And if you thought at the time there was some disputed evidence to offer, you had the obligation to present it at that time because Judge Casey had not yet made a ruling.

MR. COZEN: Excuse me.

THE COURT: And so Judge Casey -- you made the complete argument that you had at the time. And Judge Casey -- didn't he reject that argument?

MR. COZEN: Yes. But that is not the way it happened.

THE COURT: Okay.

MR. COZEN: The way it happened, your Honor, was that motions to dismiss were filed.

THE COURT: Right.

MR. COZEN: Our allegations -- and if you look at our allegations in our first amended complaint, they go from paragraph three -- as to the Kingdom of Saudi Arabia, from 398 to 505; including direct allegations of Saudi government officials in the United States aiding the terrorists by union,

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aiding the terrorists in the United States.

They go to the whole issue of the Kingdom through its dominated and controlled charities and other nongovernmental organizations.

THE COURT: Okay.

MR. COZEN: Using them as fronts to fund international terrorism.

Those allegations were not disputed factually. They were argued legally.

We believe Judge Casey made the wrong legal decision.

We would think on the basis of --

THE COURT: Which part of the decision do you say is wrong that you should be able to argue again?

MR. COZEN: He only decided on -- as to the Kingdom on the basis of the discretionary function exclusion.

THE COURT: Right.

MR. COZEN: And the fact of the matter is that when you look at the Doe case, Doe cites -- Doe cites, with approval, Liu and Letelier.

And Liu and Letelier stand for the proposition that any such activity as we have alleged where sovereign nations set about to kill other people, to assassinate them, to impose acts of terror upon them, are in and of themselves by their nature nondiscretionary.

So my position is that --

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THE COURT: Well but that's not the allegation you made against the Kingdom of Saudi Arabia.

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3 MR. COZEN: It certainly is.  
 4 THE COURT: That the Kingdom of Saudi Arabia  
 5 specifically planned the torts that you're --  
 6 MR. COZEN: No. That wasn't the allegation.  
 7 THE COURT: Right. That's not the allegation.  
 8 MR. COZEN: But the allegation was the same allegation  
 9 as in Afghanistan.  
 10 The allegation was that the Kingdom of Saudi Arabia --  
 11 THE COURT: Supported terrorists.  
 12 MR. COZEN: Supported international terrorism through  
 13 their dominated and controlled agents, servants, alter egos,  
 14 etc., knowingly did so, fully foreseeing that they would attack  
 15 western interests including the United States.  
 16 THE COURT: And the circuit said if it turns out that  
 17 their investments and their contributions to charities were --  
 18 are discretionary functions, then you can't sue them.  
 19 Isn't that --  
 20 MR. COZEN: That is not what the circuit said at all.  
 21 THE COURT: Then what would be the purpose --  
 22 MR. COZEN: That is not what the circuit said at all.  
 23 They never reached the issue.  
 24 THE COURT: What would be the purpose of -- they said  
 25 that the district court -- they said the district court ordered  
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 1 further discovery to provide for fact finding with regard to  
 2 whether the alleged acts were attributable to Afghanistan and  
 3 whether they were discretionary.  
 4 MR. COZEN: No. You're talking about Doe. You're  
 5 talking about Doe.  
 6 And what happened in Doe was that the Second Circuit  
 7 panel then approved, in a mini en banc procedure, said the  
 8 allegations in the pleadings allege nondiscretionary acts.  
 9 We're sending this back for jurisdictional discovery with  
 10 regard to whether or not there were -- there was a  
 11 discretionary function involved. So they have to litigate  
 12 that.  
 13 THE COURT: Right. And that's already been litigated  
 14 here.  
 15 MR. COZEN: No. It has not been litigated here.  
 16 THE COURT: But you argued that in front of Judge  
 17 Casey.  
 18 MR. COZEN: But the fact is it has not been litigated  
 19 here because we took that up on appeal. That was one of our  
 20 main arguments --  
 21 THE COURT: I'm not talking about appeal. I'm talking  
 22 about what was litigated here.  
 23 MR. COZEN: How can I be foreclosed --  
 24 THE COURT: You fully litigated that here, didn't you?  
 25 MR. COZEN: How can I be foreclosed --  
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 1 THE COURT: That's not the question.  
 2 MR. COZEN: -- from having my day in court and my  
 3 right to prove that these were nondiscretionary acts and have  
 4 that argument in front of the Court of Appeals.  
 5 The only way that that can happen, your Honor, the  
 6 only way that that can happen is if --  
 7 THE COURT: For me to do what?  
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MR. COZEN: Is if you do what 60(b)(6) gives you the inherent authority to do.

THE COURT: And what would that --

MR. COZEN: And that would be to vacate the judgments, bring them back into the case, let them assert whatever defenses they want to assert, both legal and factual. If discovery is necessary, we'll form and frame that discovery and take that discovery. And then you have to make a determination based upon that discovery as to whether or not discretionary function is really involved in this case.

Now, as to the other two alternatives -- and that's why you should never reach the alternative bases.

But as to the other two alternatives, that was disposed of in Doe. The caused by, and entire tort alternatives were disposed of by Doe specifically holding that on the exact same kind of set of facts, the damage occurred in the United States, the tort occurred in the United States, and, in fact, the caused by means general proximate cause.

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They adopted. They said there is no question, no question that on the basis of the pleadings they meet all of the first five requirements in the litany of requirements under 1605(a)(5).

So, what I'm suggesting to the court is Rule 60(b)(6) has, as the Supreme Court says, gives this court the inherent power, in simple English, for any other reason to vacate judgments whenever such action is appropriate to accomplish justice.

I think it would be a perversion of justice not to bring them back into the case. And the jurisprudence of -- let me suggest to your Honor -- the jurisprudence of this circuit and other circuits is very helpful in this regard.

First, where a change in the law goes to the very basis of a claim or defense, that meets the exception or extraordinary circumstance that is required under the Rule 60(b)(6) test.

THE COURT: Well in what way does a change in the law with regard to whether or not the noncommercial tort exclusion could have applicability, how does a change in that law affect a determination that even if it does have applicability these are discretionary functions that take it outside?

MR. COZEN: It has applicability, your Honor, because you've got -- you have to then decide a factual -- a fact intensive question that Judge Casey didn't ever address.

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THE COURT: But he did address.

MR. COZEN: No, he addressed it, but not in a fact intensive inquiry.

THE COURT: Well I don't see on your papers what different set of facts that you claim exists now that you're relying on than the different set of facts that you were relying on in front of Judge Casey.

MR. COZEN: We have the same factual allegations. If there is a requirement for factual discovery to determine whether or not any specific laws were broken or whether the nature of the acts is violative of international law and the laws of humanity and, therefore, cannot be possibly



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discretionary, as Doe adopted by adopting the language of Liu -- the holdings of Liu and Letelier, then we're going -- we're going to have a basis for saying Judge Casey was wrong. You should correct that wrong. And you should hold that the discretionary function exclusion doesn't exist. But you don't reach that unless and until you recognize that since the sole and exclusive basis for dismissing our appeal was that 1605(a)(5) didn't apply. Now we know 1605(a)(5) does apply. So now let's apply it.

THE COURT: But Judge Casey did apply it. He applied that analysis, didn't he?

And he made a specific finding that because there were no factual disputes raised in the Court's resolution of this

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motion no jurisdictional discovery is necessary. He specifically made that determination.

MR. COZEN: And we took that up saying that was wrong. And we never got an answer to that because the Court of Appeals made the determination that 1605(a)(5) didn't apply in the first instance.

We believe Judge Casey was wrong. We believe we will be able to convince you he was wrong.

THE COURT: That's what I'm asking. I understand your argument that you want an opportunity to argue to the circuit that Judge Casey was wrong.

How does that give you a do-over for Judge Casey's decision in front of me?

MR. COZEN: Your Honor, it is not so much a do-over of Judge Casey's decision as it is a right to bring parties back into a case who were improvidently let out of the case, bring them back in, and now deal with the issues that exist within 1605(a)(5).

If there is the need for jurisdictional discovery with regard to discretionary function or any other issue, we will engage in that. And you'll make the determination in that, whether there is a need.

THE COURT: Well that's a big "if."

You're not arguing that to me now.

I have no reason to believe that discovery is

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appropriate because Judge Casey said no factual disputes have been raised. Jurisdictional discovery is not necessary or appropriate. And you've put nothing in your papers to argue that it is.

MR. COZEN: Well, excuse me, your Honor, but we have. In fact, we have.

THE COURT: You've done discovery. So what facts are --

MR. COZEN: No. We didn't do any jurisdictional discovery on discretionary function because there was no dispute. The Kingdom and the Commission did not dispute our factual allegations.

THE COURT: So what's the dispute now?

MR. COZEN: The dispute now is whether or not if you take -- if you still take our factual --

THE COURT: The factual dispute.

MR. COZEN: I don't think there is because if you

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take -- if you take our factual assertions --

THE COURT: As Judge Casey did.

MR. COZEN: -- as true.

THE COURT: As Judge Casey did.

MR. COZEN: -- as true.

THE COURT: Right.

MR. COZEN: Then on the basis of the Doe decision and on the basis of Liu and Letelier I think you must come to the SOUTHERN DISTRICT REPORTERS, P.C.

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conclusion that no foreign sovereign can engage in the support of killing innocent people and say that is a discretionary act.

Now, the fact of the matter is, your Honor, sure, there are two ways to go about this. I think that this is the quintessential case for 60(b)(6) relief. Clearly, the sole and exclusive basis for throwing us out was that 1605(a)(5) didn't apply.

THE COURT: That wasn't the sole and exclusive basis of throwing you out.

MR. COZEN: It was.

THE COURT: It was not. Judge Casey went through the analysis that you asked him to go through. Right?

MR. COZEN: No. Judge Casey found that 1605(a)(5) did apply but the discretionary function exclusion A knocked it out. We took that up to the Court of Appeals. We argued it in front of the Court of Appeals. They never reached that argument.

THE COURT: I understand that. I understand that.

MR. COZEN: So what I'm saying --

THE COURT: I'm trying to figure out whether you're simply trying to get me to redécide Judge Casey's decision or you're simply trying to find a mechanism to go back to the circuit and have them review on appeal what Judge Casey did. Those are two different issues.

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Are you asking me to simply get you back to the circuit so you can appeal Judge Casey's ruling again or are you asking me to make a different determination than Judge Casey did on the exact same record that both of us have?

MR. COZEN: I'm asking you to do two things.

I'm asking you, one, to rule on the 60(b)(6) motion which is well grounded and is the quintessential type of case in which it would be a perversion of justice for this court --

THE COURT: Well that doesn't answer the question that I just asked you.

MR. COZEN: I'm trying to answer.

THE COURT: That doesn't answer the question I asked you. Are you asking me --

MR. COZEN: I'm telling you.

THE COURT: No, you didn't tell me. I gave you two choices and you've given me a third.

MR. COZEN: No.

THE COURT: I asked you a specific question. Are you asking me -- you want me to give you 60(b)(6) relief so that you can have an opportunity to relitigate the issue that was decided by Judge Casey, or are you asking for 60(b)(6) relief so you can go back to the circuit and appeal Judge Casey's



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23 decision?

24 which one of those two are you asking me to do?

25 MR. COZEN: Both. And I'll tell you why. Now I'll

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1 explain why.

2 THE COURT: Well I can't do both.

3 MR. COZEN: Well, you can. Because you have two

4 separate issues before you.

5 The first issue you have is whether 60(b)(6) relief is  
6 justified.

7 Forget about what the defenses may be. Forget about  
8 what the legal arguments may be as to ultimately why the claim  
9 ought to be dismissed. We don't agree, but leave that aside.

10 The only question before this court right now is  
11 whether or not to grant or not grant 60(b)(6) relief where  
12 there has been, after a full and complete appeal and a sole and  
13 exclusive basis saying 1605(a)(5) doesn't apply, a total  
14 reversal by the Court of Appeals. And you have another case,  
15 whatever happens to it, another case, identical situation,  
16 identical for wrongful acts, identical assertions against  
17 another sovereign state, identically in the same position as  
18 Saudi Arabia. That's going to go forward. What results in  
19 that, I don't know.

20 THE COURT: It could end up being the same result as  
21 in this case. I don't know.

22 MR. COZEN: May be. I don't know either. I'm not  
23 prejudging that. I'm not conflating the two.

24 If I get my 60(b)(6) relief, then I'm sure that my  
25 friends on the other side will assert as defenses, legally and

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1 perhaps factually, which they didn't do before, the alleged  
2 alternative grounds or maybe at least one of the alleged  
3 alternative grounds that they have asserted in their papers.

4 Your Honor will have to make a decision as to whether  
5 or not those have legal validity.

6 We want the opportunity to argue before you that they  
7 do not have legal validity based upon the jurisprudence that  
8 has grown up, particularly the adoption by Doe of Liu and  
9 Letelier and the other case law that is developed in the  
10 various circuits with respect to these issues.

11 We want to have the opportunity to argue that to you.

12 You may conclude, after we argue that, that, you know,  
13 I don't think there is enough, just by the assertions and the  
14 RICO statements, I don't think there is enough for me to decide  
15 this. I want some additional jurisdictional discovery.

16 Or you may conclude I think Judge Casey got it right.  
17 I'm going to hold the same way.

18 And now we'll go up on appeal on that narrow issue.

19 And the Court of Appeals will hear us on that narrow issue.

20 But you can't get there at all -- you can't get there  
21 at all unless you first do what is the right and proper thing  
22 to do and which I believe would be an abuse of discretion not  
23 to do, which is to take a change of the law that goes right to  
24 the heart of our right to be in court, 9/11 victims to have  
25 their day in court and throw them out and say no, I'm not going

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1 to relieve the judgment.

2 Now, it may very well be -- it may very well be that  
3 at the end of the day you come to the same conclusion as Judge  
4 Casey did or you come to a different conclusion from what Judge  
5 Casey did. In either event, one of us will then take that  
6 narrow question up on appeal to the Second Circuit and now the  
7 Second Circuit will have to deal with it.

8 On the other hand, if you were to deny what I believe  
9 we are so clearly entitled to, which is the 60(b)(6) relief and  
10 vacate that judgment, then we will go up to the Second Circuit  
11 saying that you abused your discretion. And the Second Circuit  
12 will make a determination as to whether you did or did not  
13 abuse your discretion. It will not, however, have before it,  
14 nor will it have the ability to decide whether or not Judge  
15 Casey was right in the first instance back in 2005. That won't  
16 be before the Second Circuit.

17 So the only way to get there, the only way to get  
18 there for both sides, if that's the issue that has to be  
19 decided -- I make it clear, once again, I personally don't  
20 believe it has to be decided because I believe that the Second  
21 Circuit in Doe by their articulation and adoption of Liu and  
22 Letelier and the importance of Liu and Letelier in the  
23 1605(a)(5) context, the fact that Congress had it in front of  
24 them when they passed the terrorist exception and that Letelier  
25 specifically says, and Liu also refers to the fact that you

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1 can't have discretion to kill people. That's not a  
2 discretionary act.

3 So let's make it clear. The discretion we're talking  
4 about is not the state's discretion to give money to charity.  
5 That's a red herring. We're talking about the state's right to  
6 fund international terrorism knowing the foreseeable and  
7 probable result and to be held accountable for it.

8 So the only way that we can resolve what apparently,  
9 your Honor, is a dilemma that you have articulated, which is do  
10 you want a do-over when Judge Casey decided against you in  
11 2005, is to grant the 60(b)(6) relief. That's a different  
12 issue.

13 Are we entitled to that because a change in the law  
14 where our case was gutted by the wrong law, go back and argue  
15 again on the present record, or on a more fulsome record if  
16 your Honor believes that there should be developed a more  
17 fulsome record, together with Magistrate Judge Maas. And then  
18 have you make that determination. Are these other alternative  
19 grounds -- none of which Judge Casey accepted, by the way --  
20 are these -- other discretionary function -- are these other  
21 alternative grounds valid? Do they have any substance?

22 You have to make that decision, your Honor. And when  
23 you make that decision, for me or against me, I then have an  
24 ability to go to the Second Circuit and say to the Second  
25 Circuit here's the specific holding. You know that 1605(a)(5)

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1 is applicable. Here is why we were thrown out. Or here is why  
2 we were kept in. Was it right or wrong?

3 But I can't get there simply by taking you up to the

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4 circuit on the abuse of discretion standard if you deny my Rule  
5 60(b)(6) application. That I can't do. Because that will not  
6 encompass that question.

7 And that's why I've asked you, please, sir, to  
8 understand -- and I think the case law is pretty clear on this.  
9 That's why such broad discretion is granted, why you have this  
10 great reservoir to do equity here.

11 Let's not conflate the two. 60(b)(6) gives you the  
12 unfettered authority to vacate the judgments. Once those  
13 judgments are vacated, we'll have plenty of time to argue all  
14 of the implications of the Doe decision, all of the  
15 implications of Liu and Letelier and any other legal defenses  
16 that the defendants want to put forward.

17 But since we were thrown out by an -- what is now an  
18 erroneous interpretation of the law, has been determined by the  
19 circuit to be an erroneous interpretation of the law, that went  
20 to the very heart and gut of our right to even be in the case,  
21 we have a right -- I would suggest particularly in view of the  
22 fact you're going to have to deal -- you've got -- let me make  
23 one final point because I think you've probably heard enough  
24 from me. Let me make one final point.

25 You've got Afghanistan over here and the Doe

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1 plaintiffs are just like our plaintiffs. They're proceeding  
2 against Afghanistan. You're going to have to decide that. But  
3 they're proceeding. They have a right to proceed.

4 we, on the other hand, same case, same facts, same  
5 wrongful acts, same kind of theories, don't have the right to  
6 proceed. That can't be. We may have a right to proceed and  
7 lose or we may have a right to proceed and win. But we have a  
8 right to proceed.

9 And, in fact, any decision other than the granting of  
10 our 60(b)(6) motion would be in derogation of and undercut the  
11 whole theory behind the Foreign Sovereign Immunities Act.  
12 Because the purpose of the Foreign Sovereign Immunities Act,  
13 particularly when you read the House report, when that act was  
14 passed back in 1976, was to bring uniformity of treatment  
15 between every sovereign state. Uniformity of treatment.

16 You're not going to have uniformity of treatment if in  
17 your same MDL some 9/11 victims have a right to go ahead and  
18 sue Afghanistan and other 9/11 victims don't have a right to go  
19 ahead and sue Saudi Arabia and the Saudi High Commission.

20 At the end of the day, you may decide for other  
21 reasons we're right or we're wrong and somebody is going to  
22 take it up on appeal.

23 But you won't have that inconsistency which undermines  
24 the very thesis and the very basis of the Foreign Sovereign  
25 Immunities Act in the first place, which is to bring uniformity

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1 to the treatment of every foreign state.

2 And of course I'm referring to those -- other than  
3 those who have been designated as state sponsors of terrorism.  
4 They're in a different category.

5 So, I would urge this court that when you read Doe,  
6 when you see footnote fifteen and you recognize that the sole  
7 and exclusive basis on which we were thrown out by the circuit  
8 was one that has been overruled and abrogated, we have a right



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to bridge the -- and we're timely. We brought the motion timely. The instrumentalities and agencies which they control and dominate are still in this case. Some are up on appeal. Some are still before you. It's only been two years since the Supreme Court denied our petition for cert. And I won't get into the arguments as to whether or not there is even a shorter period of time. But justice and equity require that the 60(b)(6) motion be granted, that we be given the opportunity to have them back in the case.

And then we'll litigate those issues. If you feel the same as Judge Casey did on the basis merely of allegations and you want to construe discretion the way he did, which is the discretion to decide to give to charities as opposed to the discretion to finance terrorism to kill people, that will be your determination. But we'll have a clean shot in the circuit which we can never get simply by going up on a denial on an abuse of discretion basis.

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THE COURT: Let me hear from the other side.

Yes.

MR. KELLOGG: Good morning, your Honor.

Michael Kellogg. I represent the Kingdom of Saudi Arabia. I'll also be speaking on behalf of the Saudi High Commission, which is represented by Roy Englert.

The plaintiffs have conceded, as your Honor has pointed out, that there has been no change in the decisional law on which Judge Casey based his decision back in 2005. As a consequence, the whole premise of their 60(b)(6) motion is lacking.

Judge Casey agreed with the position ultimately adopted by the Second Circuit that a tort act could proceed and was not precluded by the fact that it did not fall within the state sponsorship of terrorism exception. But he held that it was a discretionary function based on the allegations made by the plaintiffs, based on the evidence presented by the Saudi High Commission, based on the representations made by the Kingdom of Saudi Arabia. The plaintiffs made all of these arguments that they want to make again at that time.

They argued Letelier and Liu. They argued that Bayoumi might have been an agent of Saudi Arabia. They sought jurisdictional discovery which Judge Casey properly denied under the Second Circuit's precedent in *Virtual Countries v. Republic of South Africa* that when a sovereign state comes in

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and asserts FSIA immunity it is the responsibility of the plaintiffs to present evidence -- not just allegations but evidence to dispute that in order to go forward and get jurisdictional discovery.

Now, Judge Casey held you haven't made that showing. He denied their request for jurisdictional discovery.

They did not even appeal that discretionary decision to deny them jurisdictional discovery. Instead, they went on the record as it was before Judge Casey and they argued that the discretionary function exception did not apply.

Now, of course the Second Circuit did not reach that decision because it held, based on the state sponsorship of terrorism exception, that they didn't even have to go there.

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Judge Casey, of course, agreed with the position taken by the Second Circuit now in the Doe case which is why he reached the discretionary function exception.

THE COURT: Well when you say he agreed, that wasn't his ruling.

MR. KELLOGG: He agreed with that -- his ruling was based on the discretionary function exception. That's correct.

THE COURT: Well, no, his ruling was based on the inapplicability of the exception.

MR. KELLOGG: It was based on the inapplicability of the tort exception because it was a discretionary function.

THE COURT: Well the -- those are alternative

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determinations. I don't remember Judge Casey saying -- making a ruling that, in fact, that the noncommercial tort exception did apply.

MR. KELLOGG: No. He held that it did not apply.

THE COURT: Right.

MR. KELLOGG: He also held that it was not precluded by the state sponsorship of terrorism provision, the provision about providing material support to terrorists. So in that respect he ultimately agreed with what the circuit held in Doe which is why he went on to reach the discretionary function exception and held in our favor.

The solicitor general representing the department of justice and the department of state was invited by the Supreme Court to file a brief on the petition for certiorari. And they -- although they disagreed in some respects, as well with the Second Circuit's reasoning, they agreed with the result and they said -- and I'm quoting from the amicus brief at three, four.

"The lower courts correctly concluded that Saudi Arabia and its officials are immune from suit for governmental acts outside the United States. While the United States disagrees in certain respects with the analysis of the court of appeals further review by this Court to determine the best legal basis for that immunity is unwarranted."

And the Supreme Court followed the solicitor general's

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recommendation and denied certiorari.

Now, nothing in Doe has cast any doubt on what the solicitor general had to say or on Judge Casey's original decision in this case.

THE COURT: Well why is the solicitor general's advocacies determinative one way or the other?

MR. KELLOGG: It is not. What is determinative is Judge Casey's decision. I simply raised that to point out that the United States, the state department, etc., agreed with Judge Casey's original decision to deny the case and said that further proceedings were unnecessary and inappropriate particularly in an FSIA context where the burdens of litigation on a sovereign state are supposed to be avoided as promptly as possible if a relevant exclusion applies.

Now as your Honor quoted, the court in Doe said let us be clear. We make no judgment as to whether the allegations in that complaint are sufficient to state a claim or even to provide jurisdiction. They simply remanded for this court to

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19 make its own determination as to whether the discretionary  
20 function exception applied.

21 Counsel makes a great deal of the fact that they cited  
22 Letelier and Liu. They cited Letelier and Liu only for the  
23 proposition that a terrorist attack within the United States  
24 could fall within the tort's exception to immunity. But they  
25 did not make any determinations regarding whether the

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1 discretionary function exception applied. And they remanded to  
2 this court.

3 Indeed, and quite remarkably, they cited Judge Casey's  
4 earlier discretionary function exception with approval noting  
5 that he dismissed, quote, similar claims against Saudi Arabia  
6 and instrumentalities, quote, after finding the alleged acts  
7 encompassed in the discretionary acts exemption.

8 So it could hardly be calling into question Judge  
9 Casey's prior decision in this case.

10 Now as I noted, plaintiffs are now arguing that they  
11 want jurisdictional discovery. Judge Casey denied them  
12 jurisdictional discovery and they did not even appeal that  
13 determination.

14 So, the whole premise of their 60(b)(6) motion is  
15 simply mistaken. There has been no change in the decisional  
16 law on which this court's decision was based.

17 Judge Casey granted the motion to dismiss over seven  
18 years ago, in 2005. Final judgment was entered in January of  
19 2006. And I would note it was entered at the behest and the  
20 urging of the plaintiffs who wanted finality so that they could  
21 take that appeal.

22 Now, there were three cases against the Saudi High  
23 Commission. That were not part of that original judgment. But  
24 there was a stipulation entered in May of 2005 that  
25 specifically said the parties hereto, quote, will adopt as a

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1 binding order in the action with regard to Saudi High  
2 Commission the order of this court deciding the consolidated  
3 cases.

4 So effectively this final judgment applied to the  
5 Saudi High Commission as well in all of the cases. It applied  
6 to Saudi Arabia itself in all of the cases. That is over six  
7 years ago that the cases -- that final judgments were entered.

8 THE COURT: well, you don't argue, though, that they  
9 had the basis to raise this issue prior to the Court's decision  
10 in November.

11 MR. KELLOGG: I'm sorry. Your Honor I didn't quite  
12 catch that.

13 THE COURT: You're not arguing that it's -- that they  
14 should have -- they had an opportunity to timely make this  
15 motion based upon the Court's -- the Circuit's most recent  
16 decision at any time prior to November when the Court issued  
17 its opinion.

18 MR. KELLOGG: Well, of course. It's a change in  
19 decisional law. And that's the basis of their motion.

20 But the Second Circuit has made absolutely clear that  
21 a change in decisional law is not a, quote unquote,  
22 extraordinary circumstance sufficient to warrant vacating a  
23 prior final judgment.



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They said that quite clearly in the Deweerth case cited in our briefs; that even when a prior judgment turns out  
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to be wrong that is not a basis for disturbing the finality of that judgment, particularly not a seven-year-old final judgment.

Now plaintiffs accordingly argue that there's certain equitable factors that justify reopening it in this case. They say there's a risk of inconsistent judgment.

Well the Second Circuit dealt with that issue as well in United Airlines v. Brien, which we cite in our case.

And they said specifically at page 176 of their opinion, potential hardship resulting from inconsistent judgment is, quote, not by itself sufficiently extraordinary to justify reopening a judgment.

All of the cases the plaintiffs cite are not only much fresher than the final judgments at issue here but they were cases in which inconsistent results against the same defendant was at issue. The defendant was still in the case. One plaintiff was going to be able to proceed and one plaintiff was not going to be able to proceed. And the reason for that had to do, generally when the court granted, with one case had been removed to federal court. And the federal court, anticipating under Erie what the state court was going to decide, tried to make a judgment and got it wrong. Those are the factual scenarios in which the courts have, in rare circumstances, granted a 60(b)(6).

We have nothing of that sort here. The fact that  
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Afghanistan remains in the case for now is not a reason to reopen the case against Saudi Arabia and the Saudi High Commission who have been out of this litigation for years. There's nothing perverse about that. That's standard litigation practice.

And, indeed, it was urged by plaintiffs themselves.

As I said, they sought the final judgments, the Rule 54(b) judgments in this case in May of 2005. Their motion for entry of final judgment against the Kingdom of Saudi Arabia and they said, quote, this is at page seven of their motion, the claims against each defendant can be separately enforced; accordingly, the claims against the defendants are separable from the surviving claims.

And, again, they said the judgments themselves -- the judgments entered on behalf of the defendants could not be more final. That's what they said about the judgments against the Kingdom and the Saudi High Commission.

So the finality of those judgments, which was urged by the plaintiffs, has to be respected at this point.

Plaintiffs have cited no case under 60(b)(6) remotely comparable to the circumstances at issue here.

Now, they argue: well there would be no hardship on the defendants if they were brought back into the case seven years later.

That is emphatically not the case.  
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These cases have been closed for a long time. Sovereign immunity under the FSIA, as the Second Circuit stressed in the Robinson case, is not just from liability; it's also from the burdens of litigation. And it would be contrary to establish principles of sovereign immunity to require Saudi Arabia in an instrumentality to now come back into the case and bear the burdens of litigation.

Again, this is a point the plaintiffs made seven years ago in their motion for entry of final judgment. And I'd like to quote again from that at page eleven.

It says in cases involving dismissals based on sovereign immunity grounds, considerations of fairness to the dismissed parties weigh heavily in favor of early appeal and swift final dismissal from protracted litigation. In such cases should this court's order of dismissal ultimately be sustained -- and here's the critical part quoted from them -- these parties are entitled to the finality such relief promises as soon as possible, not years in the future, and without the substantial costs and uncertainty of being forced to submit to litigation until an appeal finally ripens. They got their wish. They got their appeal. They lost. They sought Supreme Court review. They lost.

Now, the Second Circuit has subsequently changed the decisional law on which it decided this case. But the Second Circuit has always made clear that is not a basis for reopening

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the judgment.

Afghanistan, I should note that the allegations against Afghanistan are very different from those against the Saudi High Commission and the Kingdom of Saudi Arabia as described by Judge Casey.

They argue -- and I'm quoting here from the F.Supp. District court decision. They argue that Afghanistan expressly agreed to conduct illegal and unlawful terrorist attacks on the United States.

Now, in discovery on remand Afghanistan is going to have an opportunity to put in evidence on that. There will be jurisdictional discovery, to see if there's any such basis for analogies like that.

But there was no comparable allegation against Saudi Arabia.

The allegation against Saudi Arabia, as Mr. Cozen conceded, was not that they helped plan the attacks; not that they agreed to attack the United States. The allegation was that they set up certain charitable organizations in Bosnia, in other locations, and provided money to those that ultimately found its way into the hands of terrorists.

The one allegation that they harp upon concerns a Mr. Bayoumi in California who they claim -- they claim it more directly now, but in their complaint they said suggested that he might be an agent of Saudi Arabia. Judge Casey looked at

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those allegations, held that the discretionary function applied.

Letelier and Liu are very different cases where the agents of the foreign government actually went in and committed

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murders in the United States. And the courts there held that the discretionary function exception did not apply.

Judge Casey considered all of that and made a very careful, considered decision that discretionary function does apply. That decision has held up for seven years now. It's a final judgment. And it's completely inappropriate and completely unjustified under the case law to now reopen it, drag sovereign entities back into court to defend themselves against charges that they successfully defeated and had dismissed seven years ago.

Thank you, your Honor.

THE COURT: Did you want to respond?

MR. COZEN: Yes, I would like to respond, your Honor.

On several different bases.

In the first place I think it's very, very important for this court to recognize that Judge Casey denied us jurisdictional discovery because he viewed the discretion as the right of the state to give money to charity, which was not the basis or the gravamen of our complaint to begin with.

Number two, the Doe panel on the basis of the pleadings -- and I would direct your Honor to the district

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court opinion in Doe.

Because in the district court opinion in Doe you will see that they set forth what all of the allegations were against Afghanistan; that they provided material support and resources, including a safe haven of base of operations, that they had meetings to plan activity -- terrorist activities such as Bayoumi, which we said directly took place in the United States.

What I'm trying to point out to you, is this, your Honor, having said all of that, what did the Doe panel do?

The Doe panel went ahead and they said 1605(a)(5) applies. We agree with the district court that it does. We disagree with our prior brethren here in the circuit.

Now this is the law of the circuit. Based upon the pleadings, we are now sending this back for jurisdictional discovery.

At the very least, that's what ought to happen here if it is necessary to do so because our defendant colleagues dispute or disagree with our factual assertions.

So, if you want to follow Doe, because our panel didn't, then you've got to say, okay, let's take a look at the pleadings and let's have some jurisdictional discovery on the issue of discretionary function.

I would, again, urge this court that the terrorist attacks three-panel clearly understood our claims differently

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from what Judge Casey understood them as.

Judge Casey cast them as the Kingdom decided to give money to charities and that was a policy decision. Even our court of appeals didn't see it that way. When you read their recitation of the facts, the inferences that could be gleaned from our factual recitation, they saw it entirely differently. They saw it exactly what we meant.

That wasn't the decision we were complaining about. The decision we were complaining about was their decision to



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use charities and banks as fronts and alter egos to become part and parcel of al-Qaeda and fund terrorism throughout the world and with foreseeable consequences in the United States.

So, even our panel didn't see the facts the way Judge Casey saw the facts. So if Doe says, on the basis of the pleadings go take discovery, we ought to have that same right.

Now, that gets to Mr. Kellogg's other notion that somehow this is really good for the Foreign Sovereign Immunities Act. Somehow the balance that we ought to -- that we ought to draw here is taking one foreign sovereign and protecting it from having to litigate. But taking another foreign sovereign identically situated and say you have to litigate.

I suggest to you no, your Honor. Take a look at the House discussion of the Foreign Sovereign Immunities Act and the language that they use. Their primary overriding concern

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was uniformity of treatment between foreign states. You can't have one foreign state in an identical case being treated differently than another foreign state.

If they're entitled -- if 9/11 victims are entitled to sue Afghanistan and get discovery on what kind -- what does discretionary function mean? Does it mean that they violated a law, which means it couldn't be discretionary? Or does it mean that we adopt Liu and Letelier; i.e., if you violate the laws of humanity and international law by setting upon helping to attack innocent people and killing them, that can't be discretionary, that's another whole set of issues.

We're happy to go and meet with them on that battlefield. We never had the opportunity to do so because Judge Casey denied us the right to do so. And the Doe panel didn't deny the right to do so to Afghanistan.

And they continue to neglect the fact that we asserted the Bayoumi role in this whole thing and, in fact, as Senator Graham said he was convinced that Bayoumi acting as a Saudi government official was directly involved in the 9/11 attacks. Whether or not a finder of fact later determines that to be the case is a different issue. But it certainly doesn't even come close to dealing with a discretionary function exclusion.

Now I would say -- I would say to your Honor, you know, you take a look at Doe. Don't just take a look at the circuit case. Take a look at the district court case. See the

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allegations that they had in front of them. See the relief that the circuit gave them. And note, note, please, that they point out in Doe that in the debate surrounding the adoption of the terrorism exception, the prior cases, Liu and Letelier were actually, not just presumptively, but actually before them. They were aware of their existence and they discussed them.

And it was Letelier that said those decisions make clear that a foreign state has no discretion to perpetrate conduct designed to result in the assassination of an individual or individuals; action that is clearly contrary to the precepts of humanity as recognized in both national and international law.

So, the point that I make here, your Honor, is if you view, as Judge Casey viewed, which the Court of Appeals didn't view it the same way, but if you view the decision that has to

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be viewed -- that has to be examined for discretion as we're going to give money to Islamic charities, that's not what this case is all about. Doe didn't view it that way in looking at the activities of Afghanistan. They viewed it differently. And our Court of Appeals panel, headed by Chief Judge Jacobs viewed it differently. They understood exactly what the gravamen of our complaint was. And it wasn't about making a decision to give money to charity. It was about using charities as a front and as an integral component of al-Qaeda for the purpose of perpetuating the establishment of an international structure of terrorism capable of attacking the

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United States which they did.

Finally, your Honor, I must say, once again, and you'll forgive me if for some reason I haven't been articulate enough in my discussion of this particular issue. It is clear to me, from my reading of the 60(b)(6) jurisprudence in this circuit, and in the United States Supreme Court, that one cannot conflate the issue of the right to 60(b)(6) relief with the issue of: what will happen afterwards? Are there good defenses? How will the merits be decided?

In some limited instances, you already know how the merits will be decided because the merits were decided favorable to somebody. It was then reversed. And then later on the law changed so the decision would have been differently. But that's not this case.

Your job, with all due respect, your Honor, your job is to exercise that grand reservoir of equity to say you know what, I can't have two MDL cases where one set of plaintiffs is entitled to go against one subset of sovereign defendants and the other set of plaintiffs isn't. Whatever the end result may be, I can't do that.

And I would conclude by simply pointing out once again, sir, that this court is not bound in any way, shape or form by what Judge Casey decided in 2005 on a record in which no discovery was permitted, improperly; the Court of Appeals never addressed that issue but saw the case totally different,

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totally different than the way Judge Casey saw the case. And this is now your case. And I just don't see how you can have two sovereign states in the identical position, in the identical occurrence, it's a common accident, same wrong, and have them treated differently, which would fly in the face of the whole purpose for being of the Foreign Sovereign Immunities Act.

So I would urge you, on the basis of fairness and equity, we came as quickly as we could. The final judgment as to us is only two years old. Not four years old. Not six years old. That's a smokescreen. That's misleading.

I would urge you do what is right and fair for the 9/11 victims who never had their proper day in court against these defendants, never. And the only way they can do it, get it, win or lose, is if you grant the Rule 60(b)(6) motion, put them back in the case. They, through their alter egos have been involved in it ever since anyway, but put them back in the case as parties. Let them make any argument they want. We'll meet them on it. And if you determine to give us the same kind

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of discovery that the Doe panel remanded to the district court for discovery, we'll meet them on those issues. And I believe we will convince you that we are correct because Judge Casey viewed it through the wrong prism as the Court of Appeals indicated. And I think that's what the court should do.

Thank you.

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THE COURT: I've read all of these opinions and the papers thoroughly. I'm going to go ahead and deny the plaintiffs' motion at this point. There is no basis to grant relief under 60(b)(6) under these circumstances.

First of all, the issues that the plaintiff wished to relitigate were fully litigated in this court. It is a determination that was made in this case through previous litigation. And whether the plaintiffs argue that Judge Casey was wrong in his determinations, clearly Judge Casey had the authority to rule, considered the facts as stated by the plaintiffs, and made rulings on the very same issues that the plaintiff would like to relitigate again in this case. There is no basis for that in any case simply based on a change of law on a separate issue that the circuit -- a change of law in the circuit that does not affect, nor is there any indication that the circuit intended it to affect the nature of the analysis and opinion and determination by Judge Casey.

First of all, Judge Casey clearly indicated and made the determination, quoting from both cases, "The court finds that plaintiffs' allegations cannot overcome the discretionary function exception to the tortious acts of exception." And as I've already indicated, quoting from the decision, "because there are no factual disputes raised in the Court's resolution of this motion, no jurisdictional discovery was necessary."

The Court, again, referenced in the Saudi Arabia case

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that the Court specifically ruled that the Court finds the discretionary function exception independently bars claims against Prince Sultan and Prince Turki.

In the SHC case Judge Casey similarly ruled and determined in this case that even if plaintiffs allege that SHC was tortiously liable for the attacks of September 11, such allegations could not overcome the discretionary function exception. Accordingly, SHC's alleged misuse of the funds and/or inadequate recordkeeping, even if it resulted in the funds going to terrorism, was the result of a discretionary function and cannot be the basis for overcoming SHC's immunity.

And the Court went onto rule that similarly even if plaintiffs' adequately pled a tort against Prince Salman and Prince Naif the discretionary function exception prevents this Court from exercising jurisdiction over them in their official capacity. Prince Salman's direction of SHC is discretionary. And similarly the claims against Prince Naif stem from his discretionary functions.

Those decisions were fully litigated in front of judge -- those issues were fully litigated in front of Judge Casey. Judge Casey made clear determinations with regard to those issues. And the Second Circuit's change in the -- its determination of the applicability of 1605, the noncommercial torts exclusion did nothing to change the analysis of the



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25 determination of that issue that had been determined by Judge  
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1 Casey in this case. In fact, the Court could have and had the  
2 opportunity to cast some doubt or to call into question that  
3 determination given the fact that it was overruling itself with  
4 regard to the Circuit's determination on a different issue on  
5 appeal. Instead, what the Court did is it specifically cited  
6 to Judge Casey's opinion, indicating that dismissing similar  
7 claims against Saudi Arabia was in contrast to -- based on the  
8 record that was before Judge Casey at the time, contrasts that  
9 with the determination to be made with regard to Afghanistan  
10 and the jurisdictional discovery that it had alluded to and  
11 with regard to Afghanistan and clearly -- if not clearly  
12 implying, clearly having the opportunity to address it  
13 otherwise but decided to indicate that the determination of  
14 further discovery with regard to Afghanistan was a different  
15 set of facts and a different circumstance and did not call into  
16 question the determination -- independent determination that  
17 was made in this case with regard to Saudi Arabia by Judge  
18 Casey.

19 The facts do not indicate that there is the  
20 possibility of such inconsistent determinations that compel  
21 relief under 60(b)(6). Unlike all other cases cited, these are  
22 different defendants with a different set of allegations made  
23 as to the separate defendants. Judge Casey's opinion and  
24 analysis was based on the facts as they were alleged by the  
25 plaintiffs. And the plaintiffs in this case made no different

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1 set of factual allegations and point to no different set of  
2 facts that they believe can be proffered before this court that  
3 would be a different set of facts that were utilized to argue  
4 this case before Judge Casey under which Judge Casey made his  
5 determination at that time.

6 As I said, the Second Circuit not only was aware of  
7 that determination made by Judge Casey but also clearly  
8 referenced that determination made by Judge Casey without  
9 calling into question Judge Casey's analysis, decisions, or  
10 process in terms of determining that issue in that case when  
11 they reference without calling into question that decision and  
12 analysis.

13 So in this case Judge Casey clearly made the  
14 determination that based on the facts as alleged by the  
15 plaintiff that the -- that these acts were discretionary acts  
16 that fell outside the applicability of 1605 with regard to  
17 Saudi Arabia. To reargue that, to bring back a defendant, any  
18 defendant years later simply to reargue that based on the same  
19 facts, the same law that applies is not appropriate simply to  
20 say that it would give the plaintiff some opportunity to now  
21 try to determine if there are a different set of facts that  
22 they could allege after the -- all of these years in which to  
23 call into question Judge Casey's determination. That doesn't  
24 take it out of the area of any standard case in which the  
25 Circuit may have changed its decision with regard to the basis

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of reversing or affirming a determination by the Court. And that issue does not affect in any way the validity of or the determination that was made; that the Circuit made very clear that they were making no judgment with regard to allegations in the complaint, with regard to their sufficiency, or with regard to whether, in fact, jurisdiction applied. It is only pure speculation to argue that somehow there is some likelihood of an inconsistent determination in this MDL case given the fact that there are different defendants with different sets of allegations regarding their activities and which must independently be determined in this case. And if the plaintiffs believe that the Circuit's opinion would compel the Circuit to indicate that the plaintiffs are entitled to some relief from Judge Casey's determination with regard to Saudi Arabia, then they should appeal this denial to the Circuit and give it a further opportunity, even though it had that opportunity to call it into question, to give it a further opportunity to determine: One, whether or not they have a different determination with regard to the sufficiency of the complaint with regard to Saudi Arabia to assert a claim or to provide jurisdiction or if they believe that it is appropriate to relitigate that issue and reopen -- bring back the defendant and reopen that issue in this Court.

The Court -- there's nothing in the Court's opinion that would -- could be interpreted as the Court believing that

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that was the appropriate course of action. The opinion is written in such a way as to change the Circuit's opinion with regard to its general applicability, to independently determine whether or not -- what the facts are with regard to the sufficiency of the claim and jurisdiction with regard to Afghanistan, and indicated clearly in its last paragraph before its conclusion that an analysis based on the appropriate factual determination, the analysis, a similar analysis that was done by Judge Casey should be done with regard to Afghanistan without any implication that Judge Casey's analysis was inappropriately done or procedurally invalid.

So there is no basis at this point to change Judge Casey's opinion, to revisit, to relitigate the same issue twice in the same case when that determination has been made by -- already made by the district court in this case.

So, considering all of the factors it is not appropriate to grant the relief that the plaintiffs are requesting. If the plaintiffs' main issue is that they had not had a full opportunity to litigate this further in front of the circuit, then relief should be sought from the circuit with regard to that issue. But there's nothing in the opinion -- nothing in the circuit's most recent opinion that could be used to call into question the determination that specifically referenced by the circuit in its decision to overrule its own opinion with regard to a specific legal issue addressed and

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determined by the circuit.

So for those reasons I'm going to issue an order denying the motion. I am also denying the motion by the defense to strike. I don't think that that is necessary or appropriate. I will -- this will be the record on this issue,

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6 the full record on this issue. But it's clear from reading the  
7 decisions in this case by Judge Casey that his determination  
8 was clear, that there was no question the circuit decided, in  
9 both of those cases, what Judge Casey's determination was with  
10 regard to that issue and there's nothing in those opinions that  
11 one could read into the latest opinion or any opinion that  
12 calls it into question or would imply that the plaintiffs would  
13 be somehow entitled to further relief from the determination  
14 that was made by Judge Casey which the Second Circuit has not  
15 called into question in its latest decision.

16 So for all of those reasons, considering the  
17 appropriate standard you use in this case, I'm going to deny  
18 the plaintiffs' motion for relief from judgment as an  
19 inappropriate exercise of the court's discretion in this case.

20 As I said, I will issue an order consistent with that  
21 opinion.

22 I will otherwise schedule the next conference for  
23 July 17. We'll see if we need to meet at that time. July 17  
24 at 11:00.

25 I know, given the nature of the status of discovery  
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1 with regard to Magistrate Judge Maas, before Magistrate Judge  
2 Maas it may not -- unless there are specific issues that need  
3 to be addressed, it may be more appropriate, and we can discuss  
4 it when the time comes near, to meet him before we meet later  
5 in the year.

6 So that's the determination of this court on that  
7 issue.

8 Is there anything else that we need to address today  
9 before we adjourn?

10 MR. COZEN: No, sir.

11 THE COURT: Then I'll see you in July.  
12 (Adjourned)

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